SERVED: May 23, 1994

NTSB Order No. EA-4164

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of May, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. RONALD J. TWETO, Respondent.	Docket SE-12684

OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of a hearing held in this case on November 17, 1992.[1] In that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

certificate[2] based on his unauthorized takeoff from Runway 36 at the Bethel, Alaska airport, contrary to an air traffic control (ATC) clearance to take off from Runway 18. The law judge affirmed the violations of 14 C.F.R. 91.13(a) and 91.123(a),[3] but modified the sanction from a suspension of 60 days, as sought by the Administrator, to one of 45 days. For the reasons discussed below, we grant the Administrator's appeal.[4]

Respondent concedes that he was cleared by ATC for an

---

[2] Respondent indicated at the hearing that he has since obtained an airline transport pilot (ATP) certificate.

[3] Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.123(a) provides:

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

[4] Respondent, acting pro se, filed a notice of appeal, but did not perfect that appeal by the timely filing of an appeal brief. In response to the Administrator's motion to dismiss his appeal, respondent claims that he did in fact submit an appeal brief on "Dec. 20 or so," but did not enclose a copy, or any proof of service, of the brief he allegedly filed. We can find no evidence of such a brief in our docket files. Accordingly, we grant the Administrator's motion to dismiss respondent's appeal as unperfected pursuant to 49 C.F.R. 821.48(a).

intersection takeoff from Runway 18, and that he acknowledged that clearance. He further admits, notwithstanding that clearance, that when he reached the runway, he turned in the opposite direction, thereby departing Runway 36. In doing so, his aircraft came into potential conflict with approaching landing traffic, specifically an Alaska Airlines Boeing 737 which, as a result of respondent's unauthorized takeoff, was instructed by ATC to execute a go-around. Respondent offered no explanation for his action, claiming only that it was "a simple mistake," and that he "didn't purposely go do it." (Tr. 17.) At the hearing, respondent sought only to challenge the allegation of carelessness and the length of the suspension.

The Administrator presented expert testimony regarding carelessness, and the endangerment resulting from respondent's unauthorized takeoff. On the issue of sanction, the Administrator argued that 60 days was warranted because the carelessness exhibited in this case was more egregious than in the typical case of noncompliance with an ATC instruction.

In his initial decision, the law judge noted that respondent had "been very frank about admitting that he made that mistake." (Tr. 24.) Although the law judge noted respondent's testimony that the error was not deliberate, he also commented that "it appears there was some disregard for this clearance," and speculated that "the tower told you to do one thing, and it seemed maybe like it was more convenient for you to go the other way that day so you did." (Tr. 25.) Nonetheless, the law judge

found that respondent's "attitude in . . . admitting the mistake" warranted a 15-day reduction in the sanction. Accordingly, he modified the suspension to 45 days.

On appeal, the Administrator argues against the law judge's reduction in sanction in traditional fashion. That is, the Administrator believes that in order for the law judge to modify sanction where all the allegations in a complaint have been established (as they have been here), the law judge must show clear and compelling reasons for any reduction from the Administrator's choice. This argument is made in reliance on the precedent established in Administrator v. Muzquiz, 2 NTSB 1474 (1975) and affirmed repeatedly until recently. Neither the Administrator nor the law judge reference the FAA Civil Penalty Assessment Act of 1992,[5] although this proceeding was heard after enactment and the Civil Penalty Act includes specific rules regarding deference by the NTSB to the sanction policies of the Administrator.[6] Likewise, the Civil Penalty enactment makes

[5] Pub. L. No. 102-345, 106 Stat. 923.

[6] The amended statutory deference provision reads:

> In the conduct of its hearings under this subsection, the Board shall not be bound by any findings of fact of the Administrator *but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administration and of written agency policy guidance available to the public relating to sanctions to be imposed under this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or not otherwise in accordance with law*. 49 U.S.C. App. 1429(a), as amended by Pub. L. No 102-305 (new matter in italics).

clear that the NTSB, and hence its law judges, has the authority to modify proposed sanctions only within the constraints imposed by the sanction deference provision. As a consequence of this enactment, we have indicated that the traditional approach to sanction deference found in Muzquiz has been called into question, and that simple reliance on that doctrine may be insufficient to sustain a sanction.[7]

Having acknowledged the foregoing, we note that neither the parties nor the law judge proceeded with reference to the new law, and we are hesitant to venture too far in our analysis. There are two steps that we think might better have been addressed at hearing. First, the Administrator has made no attempt to take reference to written and publicly available guidelines to sustain his proposed sanction, arguing at hearing only that this was an egregious case of non-compliance with a clearance, and on appeal that truthful testimony cannot be a legitimate ground for sanction reduction. While both of these points may be sound, they do nothing to suggest that the Board is compelled by law to adhere to the Administrator's choice.[8]

---

[7] See Administrator v. Oklahoma Executive Jet, NTSB Order No. EA-3928 (1993).

[8] While the Board is to give deference to written sanction guidelines, it would be imprudent to do so where the Administrator had not openly relied on some such documentary policy, since the Administrator's interpretation of such policy would not be before us. Here, for example, if the Administrator's handbook were to be consulted, it appears that the Administrator seeks only the minimum recommended sanction for what it terms an "egregious" act of non-compliance. See "Enforcement Sanction Guidance Table" (Appendix 4 to FAA Order No. 2150.3A, Compliance and Enforcement Program) (indicating that

It is equally difficult to accept the law judge's reasoning in support of a reduction. The Administrator points out that truthfulness is a requirement of law and that NTSB precedent stands for the proposition that the fulfillment of a pre-existing obligation is no reason for sanction reduction. This is certainly sensible as the norm for behavior must be a good faith attempt at compliance with the requirements of law. While the law judge may have been favorably impressed by respondent's candor, it remains true that there was not much on this record to argue over. A clearance was given, acknowledged by respondent, and then a departure in the wrong direction was made. The facts were hardly open to dispute. Candor then was respondent's only reasonable choice, and the law judge's decision rewards not so much truthfulness as the fact that respondent forced all parties to the expense of a hearing over an issue of sanction, despite the fact that the proposed sanction was not out of the range that might have been expected for a departure against clearance, and respondent was unprepared to offer any mitigating circumstances.

Given that neither the law judge nor the Administrator have offered argument that clearly dictates the outcome of this dispute, we turn to Board precedent. We do so mindful of the fact that, wholly apart from the specific "clear and compelling" burden traditionally imposed by Muzquiz, it is the Administrator

(..continued)
takeoff against clearance by air carrier personnel may result in a sanction of from 60 to 120 days).

who is ultimately charged with maintaining safe airspace and this fact alone dictates that earnest consideration be given to his viewpoint. Board precedent indicates that a range of sanctions between 20 and 90 days have been upheld for clearance deviation, the lower range typically for pilots operating under Part 91,[9] with the longer suspensions typically on air carrier operations or for deliberate or near deliberate violations.[10] Given that the law judge believed that the evidence supported a finding that respondent took off in the direction opposite his acknowledged clearance for his own convenience (Tr. 25), and given that the record indicates that this was not respondent's first failure to comply with an ATC clearance and that this was a commercial flight operated for a Part 135 air carrier, we believe the 60-day suspension imposed by the Administrator should be affirmed.

[9] See Administrator v. Comer, NTSB Order No. EA-3967 (1993); Administrator v. Borden, 5 NTSB 2181 (1987).

[10] See Administrator v. Teti, NTSB Order No. EA-3969 (1993); Administrator v. Bjorn & Lucas, NTSB Order No. EA-3829 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The initial decision is reversed on the issue of sanction; and

3. The 60-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[11]

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[11] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).